No. 14951

United States
COURT OF APPEALS
for the Ninth Circuit

ART JOHNSTON,

Appellant,

vs.

HUGH EARLE, Collector of Internal Revenue, et al,

Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S REPLY BRIEF

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For the purpose of reply appellant will answer each point of defendants' answering brief separately.

A. VALIDITY OF LIEN

Defendants contend that although the tractor in question wasn't in the county when the lien was filed, the residence of the taxpayer (Marshall) was in the county where the lien was filed and that is sufficient (Br. 10) to establish a valid lien.

If that contention is a correct interpretation of the

statutes (Title 26, Section 3670 - 3672 U.S.C., and 87.805 Oregon Revised Statutes set forth at page 28, appellant's brief) then plaintiff should not prevail on this appeal, if there is any proof of taxpayer's residence.

It seems almost too obvious to answer that the plain wording of these statutes means what it says (paraphrasing):

> *Such lien shall not be valid as against any purchaser until notice thereof has been filed by the Collector in the offices of the County Clerk for the County or Counties of this State (Oregon) within which the property subject to the lien is situated.*

There is nothing in the statute which even refers to the residence of the taxpayer.

Title 26, Section 3672 U.S.C. and the Oregon recording statutes requires physical presence of the property in the county to make the lien effective as to purchasers.

Counsel for defendants, and the defendants themselves, conceeded on trial that in order for a lien to be valid as against purchasers, the property must be physically present in the County in which the property is located.

In some jurisdictions, this may not be a requirement. The statute makes this a matter of the local statute.

Defendants in the lower court relied on the sole theory that the tractor was physically in Lane County. On appeal, different counsel in Washington found no evidence to sustain that theory and now contend it

makes no difference where the property was located.

Defendants in the lower court relied on the sole theory that the tractor was physically in Lane County.

Defendant Shanks (Chief Field Officer) testified (R. 94-95) as follows:

> "Mr. Erwin: Q. In order to have a valid lien on it, as to a purchaser for value, the object or article involved must have been located in the county where the lien is filed, at the time the lien is filed?
>
> Mr. Shanks: A. That is right. That is what I said.
>
> Q. My position in that regard is this: at the time you seized it, you had no knowledge as to whether or not the tractor was in Lane County or was not in Lane County, at the time the lien was filed.
>
> A. I had no knowledge; that is right.
>
> Q. None whatsoever?
>
> A. That is right. We are agreed on that, but as I told you before, the men were repeatedly instructed that that is the law. Every man in the District knew that.
>
> Q. Everybody knew that——
>
> A. Yes, sure everybody."

Based on Mr. Shanks' own testimony, he not only knew that physical presence of the property in the county where the lien was filed was an absolute requirement as to purchasers but he instructed every man in the district that that was the law.

Mr. Georgeff himself advised the court in this respect as follows (p. 7 original transcript of testimony—not printed):

> "Mr. Georgeff . . . notice of lien must be filed in the county where the property is situated to make that lien valid."

And on page 9 as follows:

"The Court: You claim, aside from the situs of the tractor, that would give you a lien as against his personal property anywhere, even if it were not in Lane County?

Mr. Georgeff: That is one view. I would not stress that too strongly personally. We contend the evidence will show the tractor was there.

The Court: Do you have evidence to the contrary?

Mr. Erwin: Yes, your honor. So the court will not be misled, it is my understanding . . . and I am sure Mr. Georgeff agrees that as far as purchasers are concerned it is not a question of notice or anything else. The tractor must be in that county or the lien is ineffective. Am I correct on that?

Mr. Georgeff: As I said, there are two views. There is the view that if you record a notice of lien in the County of residence, any property within the state, personal property, would be subject to that lien. I would not go as far as that myself on that point.

Mr. Erwin: I thought we had agreed that was not in issue."

It seems that counsel has forgotten that it is a lawyer's duty not to mislead the court. Mr. Georgeff, who represented defendants on trial was forthright with the trial court and advised that the situs of property was controlling. We are informed the brief was written in Washington, D. C. and this may account for the misleading statements, although it happens frequently enough to make one wonder if these liberties, ignorance of evidence and change of positions have not become "self-appointed prerogatives" of Washington counsel.

In addition to counsel's own admission, two former U. S. Attorneys advised the Collector's office that as to

purchasers a lien would be ineffectual unless the property was in the county when the lien was recorded (see Appellant's Brief pp. 24-25).

Because of the foregoing, we shall not spend a great deal of time in citing authorities.

The only two cases cited by counsel namely: *Investment and Securities Company v. United States,* 140 F 2d 894, and *Grand Prairie State Bank v. United States,* 206 F 2d 217 (Appellees' Br. 11), are not in point.

The Investment Securities case was decided in regard to a pledgee at a time when Section 3672 (a) did not apply to a taxpayer's pledgee and the court specifically decided the case on that ground. The court said:

> "It should be noted that the word 'pledgee' was not in the statute (Section 3672) prior to 1939 and therefore would not apply to the rights acquired by assignment in 1937."

In addition, the pledge in that case was (by the instrument of assignment itself) specifically made subject to the claim of the United States for taxes.

The case is not in point.

The other case cited by counsel is likewise not in point.

The case of *Grand Prairie State Bank v. United States* involved a claim of priority between the Federal Tax lien and a bank with whom two valuable diamond rings were pledged as security for a loan. Both the loan and the pledge were made after the government's lien was recorded in the county where the taxpayer resided.

There was no showing that the rings were not located in the county of residence of the taxpayer at the time the lien was filed. If the rings were in the county where the liens were filed, the lien would attach. The presumption is that personal property of the taxpayer is situated in the place of his residence unless another situs is established.

The bank relied on Section 3672 (b). That section provided that the lien itself would be invalid regardless of where filed insofar as purchasers of securities were concerned, if such purchasers did not have knowledge of the lien. The bank said the pledge of the rings should be viewed as a security within the meaning of the exception (subsection b). The court properly overruled the contention.

We point out that if the tractor in the present case was owned by the taxpayer and was in Lane County at the time the lien was filed, the case before this court would not have been brought.

In this case, the taxpayer did not even own the tractor in question when the lien was filed, and it never was physically present in Lane County.

In *United States v. Beaver Run Coal Co.*, 99 F 2d 610, it was specifically held that notwithstanding the mortgagee knew that mortgagor owed income taxes, the mortgage was entitled to preference over tax lien of government where tax lien was filed in the wrong district.

The court further held that it would not read into Section 3672 any limitation based on the equitable doc-

trine of bona fide purchaser without notice so as to give the tax lien priority over lien of mortgagee, which at time of execution of mortgage, knew that mortgagor owed taxes.

In *Highsmith v. Laur* (1955 Cal.), 281 P 2d 865, the court specifically held that a tax lien on property is not valid as against any mortgagee, pledgees, purchasers or judgment creditor until notice thereof has been duly filed in the office of county recorder of county within which the property is situated.

In *Gulf Coast Marine Ways v. The J. R. Harder,* 107 F. Supp. 379, it was held that a State Federal Tax lien statute where they are clear and unambiguous must be construed literally, and where the government does not substantially comply with the lien, the Government's tax lien is not effective against mortgagees, pledgees, purchasers and the like.

The Federal Tax Lien Registration Act provides that local recording statutes govern as to where the recording must be made to be effectual as to purchasers. The local statutes of Oregon provide it must be filed in the county where the property subject to the lien was situated (Appellant's Br. p. 28).

In this case, the tractor was located in Marion County when purchased by taxpayer, and it remained in Marion County. The lien was filed in Lane County.

Other cases could be cited but it would not appear necessary.

The case of *U. S. v. Eiland* (1955), 223 F 2d 118, states the rule in regard to "tangible" property as distinguished from "intangible" property.

The situs of intangible property is presumptively or inferentially that of its owner, but the situs of tangible property is the place where it is physically present.

This is a rule of evidence and does not change the plain wording of the statute in any event.

See also *Geitz v. Gray,* 280 SW 2d 859.

The entire theory of appellant's brief in regard to validity of the lien is based on "residence" of taxpayer and does not require further comment.

We shall make a comment in regard to the first paragraph on page 16 of appellees' brief, however, wherein the case of *Glass City Bank v. United States,* 326 U.S. 265, is cited.

Counsel correctly states the holding of that case which was that the lien continues and attaches to taxpayer's after required property, although there was a strong dissenting opinion.

The error of counsel is in attempting to apply the principle of that case to the facts of this case. It is true that the taxpayer did not even own the property when the notice of lien was filed, but the question in this case is not whether the lien is valid as to the taxpayer but only whether the lien is valid as to a "purchaser." The statute (Section 3672) of course, specifically makes the lien "void" as to a purchaser.

The question in this case is determined not by the validity of the lien itself, or whether it does or doesn't

attach to "after acquired" property of the taxpayer. The sole question is whether a lien is effective under the "exception" set forth in Section 3672 as to a purchaser.

The Section 3672 says the lien is "invalid" as to purchasers.

To summarize, insofar as "validity of lien" is concerned:

Appellant is totally unconcerned with the question of whether the lien was valid as to the taxpayer Marshall.

Appellees' brief is directed solely to that issue.

The lien is "ineffective" or (in the words of the statute) "invalid" as to appellant since he was a purchaser for value (admitted) and comes within the provision of Section 3672 (now 6323).

Not having a "valid" or "effective" lien, the collector or deputy collector are not authorized to seize the property. (See p. 14 and p. 26, Appellant's Brief.)

The burden of proving a valid lien is on defendants. They have failed to sustain the burden (See Appellant's Brief, p. 10).

B. VALIDITY OF WARRANT

The collector of Internal Revenue (now District Director) is charged with the duty to see that *all* laws and regulations relating to collection of internal revenue taxes are faithfully executed and complied with (See

Section 3654, subsection (a), Title 26 U.S.C., and page 17, Appellees' brief).

Appellees' brief in regard to the warrant talks about the duty of the collector and the deputy collector to collect taxes etc., but does not take issue with appellant's sole contention that the warrant under which the seizure was made was invalid.

The only statement we have found indicating any disagreement with appellant's brief is on page 19 of the appellees' brief wherein they contend that the warrant was:

> *"merely evidence of the Collector's authority to distrain and levy."*

It is difficult for us to see how defendants completely ignore the statutes on distraint which permit seizure by the collector himself in person but restrain deputy collectors from seizure unless a warrant is issued (Title 26, Section 3692 U.S.C., p. 14 Appellant's brief).

It must follow that a valid warrant is necessary to seizure of property by deputy collectors.

Appellees cite other sections of the act which have no application. The sections cited are not to be construed in pari-materia with the distraint sections in any event. *In re Holdworth,* 113 F. Supp. 878, and *U.S. v. Aetna Life Insurance Co. of Hartford Conn.,* 46 F. Supp. 30; *In re Rosenberg's Will,* 199 NE 206, 105 ALR 1238, Certiorari denied 298 US 669.

In *U.S. v. O'Dell,* 160 F 2d 304, it was held that the proper method of making a levy on a bank account was

the issuing of warrant of distraint, making the bank a party and serving the bank with a notice of levy, copy of the warrants and notice of lien.

See also *U. S. v. Manufacturer's Trust Co.,* 198 F 2d 366, and *U. S. v. Emigrant Industrial Savings Bank,* 122 F. Supp. 547.

Appellant does not contend, as appellees' brief infers, that a warrant must describe the property specifically to be valid. However, appellant does contend that where a warrant is couched in general terms such as *"the property of defendant"* instead of specific terms such as *"one caterpillar tractor serial x x x etc.,"* then the officer seizes property at his own risk if it turns out to belong to some one not named in the writ. That is the Federal Rule set for on page 17 of appellant's brief.

The authority of the collector and deputy collector is derived from the statute. They are not so-called "constitutional officers." The statutes from which their authority is derived must be strictly construed. The chief field officer, himself, testified that all his men were instructed that, as to a purchaser, no valid lien existed unless the property was in the county where the lien was filed.

As held in *Hawkins v. Savage,* 110 F. Supp. 615, the government's lien for unpaid taxes which arose at the time the assessment list is received by the collector has no binding force or legal authority, is not legally sufficient or efficacious and lacks authority of law, as against a mortgagee, pledgee, purchaser or judgment creditor unless and until it is recorded.

We have no concern with the validity of the lien as against the taxpayer. We assume it would ordinarily continue until satisfied. In this case, however, it could have been pointed out that the Government did seize and sell a certain donkey engine owned by taxpayer prior to seizing of the tractor in question. The sale brought sufficient to satisfy this lien, but proceeds were erroneously applied to later liens rather than to the lien in question (earlier). Plaintiff contended that the present lien was satisfied, but plaintiff did not raise that point and many others on this appeal.

The statute provides the "collector" shall collect. There is no reference in appellees' brief nor in the statute to any holding, wording or other authority for a levy under a warrant issued by a "former collector." When a "former" collector leaves office, he no longer has any authority to "collect" or to issue warrants of distraint.

It should be remembered that the warrant of distraint is the process by which a deputy collector actually goes out to make a seizure of property. This action requires the protection of a current and valid warrant and not one issued by a "former collector" three years previously which "on its face" is returnable in 90 days.

It is not an administrative measure, but administrative or not, it is "irregular" on its face and an officer who acts under it is not protected. Its authority had expired *by its own terms.* (See p. 18 appellant's brief.)

C. SCOPE OF AUTHORITY

Appellees cite *Erskine v. Hohnbach,* 14 Wall. 613; *Haffin v. Mason,* 15 Wall. 671; *Harding v. Woodstock,* 137 US 43; *Moore Ice Cream Co. v. Rose,* 289 US 373; and *Powell v. Rothensies,* 183 F 2d 774.

Generally, the cases cited stand for the proposition that a valid unpaid assessment against a taxpayer will provide immunity to a collector or deputy collector who collects a tax through seizure and sale or "threat of seizure" (*Moore Ice Cream Co.* case) even if the assessment later turns out to be invalid.

In other words if the assessment list is "regular on its face" it makes no difference if the assessment or the liability later turns out to be invalid. The assessment list is held to be "due process" within the meaning of the Fifth Amendment.

None of the cases cited involve a seizure of a third person's property for satisfaction of a taxpayer's liability, and are not in point. It would not be helpful to the court to discuss the cases individually.

It is only in the case of a purchaser that the statutes in question specifically limit the authority of the collector or deputy collectors to property "on which a valid lien exists," and further sets forth specifically that no valid lien exists as to purchasers "unless the property was located within the county where the lien was filed."

The authority of the public official must be strictly construed and can not be extended. *Federal Trade Commission v. Raladam Co.,* 283 US 643.

None of the cases cited or found hold that an officer is protected when he seizes one person's property for the unpaid assessment of another person's taxes.

The only time such protection would be afforded to ministerial officers is if the warrant under which they proceeded specifically described the property seized.

Under those circumstances if the officer seized the property specifically identified in the warrant, the ministerial officer to whom it was directed would probably be protected even if the property later was found to belong to another not named in the writ. The person who issued the writ, however, might not be protected unless he had a "reasonable belief" in the existence of a valid lien, i.e., if it was an abuse of the discretion vested in him.

To summarize as to "validity of the warrant":

The assessment list is "due process" in the hands of an officer charged with its collection. No "due process" is involved when an officer seizes "y's" property under an assessment against "x" and any statute which authorized such a seizure would be void and unconstitutional. *Swenson v. Jacobsen,* 232 F 2d 332.

No further factual or legal analysis of the cases cited need be made, no matters involved in this case were "committed to defendants' control," by any statute nor were any matters governed by any "lawful requirement" of any department. In fact in this case, the defendants were specifically prohibited from taking the action which they took.

D. GENERAL

The last matter to which our attention is directed by appellees, is counsel's statement that this is not a case where a certificate of probable cause might issue (Br. p. 23).

We presume this is stated in an attempt to sway the court's decision in this case by a feeling of sympathy for the defendants.

The statement of counsel is first, obviously incorrect; and second, improper and unimportant.

The matter of sympathy is not supposed to be present in judicial proceedings. However, if the cause were one in which "probable cause" would not be found, this case would probably not have been filed in the first instance.

Secondarily, this is not a matter of "innocent mistake." If it were, the case would not have been brought. The court should remember that two United States Attorneys on separate occasions advised defendants they had no right to make the seizure. They did it anyway. In addition, to that, the testimony was that all of the defendants were instructed that no lien existed on property unless it was filed in the county where the property was situated, and would not be valid in the hands of a purchaser unless it was, and defendants each by his own admission knew Johnston was a purchaser. They seized his tractor anyway.

To make matters even worse, the defendant Shanks wouldn't even accept Johnston's certified check (Exhibit

18, R. 35) for payment of the lien amount for which the lien was filed, but insisted on delivery of the tractor to the taxpayer Marshall and to his friend Stotts who was actually a joint venturer with Marshall (later held a mortgagee). One of the government's own witnesses testified Marshall was unworthy of belief (even under oath) and who had been arrested for falsification of serial numbers on another "tractor deal."

The law provides that the officers can not adjudicate claims or priorities; they have only the rights given them by statute to seize and sell. *Siverson v. Clanton,* 171 Pac. 1051; *Metropolitan Life Ins. Co. v. U. S.,* 107 F 2d 311, Cert. den. 310 US 630.

All of the foregoing is cited merely to show the court that in the present case, the natural sympathy which appellees attempt to incite should not be called forth in its "full blossomed glory" in the present case even if a certificate of probable cause would not properly issue.

If this case is not a case where a "certificate of probable cause" should properly issue, then certainly the public officials (U. S. Attorneys and Attorney Generals) should not be representing defendants. They should be represented by their own counsel. However, the fact is that the case is properly one for the issuance of such a certificate.

In the *Moore Ice Cream Co. v. Rose* case, 289 US 373, and at 382 the court said that the certifying judge was given a latitude of judgment and that it was enough (for the issuance of a certificate of probable cause) that

a seizure had been made upon grounds of *"reasonable suspicion."*

The final conclusion of counsel is that appellant should not recover because defendants did not convert the tractor to their own use and because appellant suffered no injury.

The matter of "conversion" and "damage" were not discussed in appellant's brief because there was no question in the trial court that unless the officers were immune from liability they would be liable for plaintiff's damages. None of the evidence regarding damage was brought before this court, of course, because it was felt a reversal would require a determination of damage in the lower court.

However, since appellees' brief concludes in this manner appellant will narrate the exact situation regarding the conversion and plaintiff's damage.

The taxpayer in this case (one Marshall) entered into an agreement with one Stotts, an insurance adjuster and promoter whereby the tractor (which had been caught in a flood in Marion County, the damage being adjusted by Stotts) would be put to use on a joint venture basis in land clearing in Marion County. Taxpayer's mortgage on the tractor (which was in default) was paid off by Stotts. A bill of sale of the tractor appeared to have been given by the taxpayer (Marshall) to Stotts. When Marshall did not live up to his promises, in regard to the joint venture, Stotts ordered Marshall to sell the tractor. He sold it to Johnston (the plaintiff) at Stotts' demand. The tractor was seized by the govern-

ment nearly three years after Johnston's purchase over Johnston's repeated and continuous objections.

After the seizure, Johnston offered his certified check in the amount of the lien. The Government refused the offer and insisted that the tractor be delivered to Marshall, the taxpayer, and to Stotts who was then claiming a security.

The basis of Stotts' right to bring foreclosure was the Government's attempted lien. If Johnston's check had been accepted, Stotts would have had no right of foreclosure or receivership, since he held only a bill of sale.

The officer, Shanks, held the machine over Johnston's protests until Stotts finally filed suit against both Johnston and Marshall secured the appointment of a receiver in state court claiming a right of unpaid chattel mortgagee. Stotts then paid the Government's lien and the tractor was delivered to the receiver.

Johnston was compelled to secure a bond in order to secure redelivery of the tractor from the receiver. In order to secure a bond in the amount of $9,000.00, which was a stipulated amount, Johnston was compelled to sell the tractor to one Wonderly who advanced the $9,000.00.

Johnston was unable to complete his logging contract upon which he was engaged at the time of the unlawful seizure and did not secure a return of his tractor until the Fall of 1948, when he received the tractor back on payment of $9,000.00 to Wonderly. He lost the logging contract profit and possession of the tractor for a

period of four months at the height of the logging season (original transcript of testimony, p. 151). The reasonable rental value of the equipment for the period of time he was deprived of possession was testified to be at $1500.00 a month, a total loss of $6000.00 not to speak of the loss of profit on his logging contract, together with the $9000.00 he had to pay to court, all of which was exhausted.

Counsel for appellees has either failed to read the transcript of testimony or is deliberately false in his statement that plaintiff has not been damaged.

As to the law of conversion, appellees apparently feel that since they did not personally take the property for their own personal use, they are not liable for conversion.

Such is not the law.

A wrongful seizure or sale of property under legal process constitutes a conversion, *Shepard v. Hynes,* 104 F 449; *Williams v. International Harvester,* 141 P 2d 837.

A conversion takes places when there is a distinct act of domination wrongfully exercised over another's personal property in defiance, exclusion or derogation of the title or rights to the owner for possession. 53 Am. Jur. 821; *Williams v. International Harvester* (supra).

Deprivation of possession seems to be the distinguishing factor between trespass and conversion, 53 Am. Jur. 822. See also 150 ALR 239 and 53 Am. Jur. 924; *Sorenson v. Jacobsen,* 232 P 2d 332, 26 ALR 2d 1186.

Damages for conversion generally are the value of the property at the time and place of the conversion.

The issues in this case were so framed and stipulated (R. 32). The question of damages followed this rule as follows:

> "What was the value of the tractor at the time of the seizure?"

The only testimony as to value of the tractor was that introduced by plaintiff and was in excess of $15,000.00 according to the experts (Halsten and Vice) who testified. The minimum figure was $14,000.00, and the largest figure mentioned in the testimony was $18,500.00. The value asked by plaintiff was $15,000.00. Johnston had actually $17,500.00 in cash money in the tractor at the time of seizure. The $9000.00 value contended by defendants was a figure stipulated by the parties to permit redelivery from a receiver. It did not represent its market value.

Appellant feels that under the stipulation of the pretrial order, the parties are bound by the value of the machine at the time of conversion, *Weinke v. Majeske,* 97 P 2d 179.

In *Williams v. International Harvester Co.* (supra), the Oregon court held that loss of use was also recoverable in an action for conversion.

Plaintiff's contention, however, is that plaintiff should be permitted to recover the value of the tractor only.

Appellees apparently feel that Johnston got the tractor back and therefore he wasn't damaged. This is only

partially true as defendants didn't return it but Johnston was obliged to buy it back just as if he went out on the market and bought another tractor. This $9,000.00 plus the $9,000.00 put into court was a total of $18,000.00 additional besides the $17,500.00 he had in the tractor.

The tractor became rather expensive at this point having cost Mr. Johnston some $35,000.00 and $18,000.00 of that cost was occasioned solely by defendants' insistence on seizure of the tractor after they had been independently advised they had no right to do so.

We feel certain Mr. Johnston has suffered some damage and that the trial court will have no trouble in fixing the amount, or we will stipulate that the value may be fixed by this court from the original record.

CONCLUSION

As stated in *Land v. Dollar,* 330 US 738:

> "Public officials may become tort feasors by exceeding the limits of their authority when they unlawfully seize or hold a citizen's realty or chattels. . . ."

and as stated in *Federal Trade Commission v. Raladam Co.,* 283 US 643:

> "Official powers can not be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They can not be merely assumed by administration officers; nor can they be created by the courts in the proper exercise of their judicial functions."

We might add further "and can never exceed the constitutional restrictions."

Plaintiff believes that the trial court invited the appeal on this case.

The cause should be reversed and remanded with instructions to enter a verdict for plaintiff.

Respectfully submitted,

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